

USDOL/OALJ Reporter

[*Dumaw v. International Brotherhood of Teamsters, Local 690*](#), ARB No. 02-099, ALJ No. 2001-ERA-6 (ARB Aug. 27, 2002)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 02-099
ALJ CASE NO. 2001-ERA-6
DATE: August 27, 2002

In the Matter of

DENNIS DUMAW,
COMPLAINANT,

v.

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 690; AND FOSTER
WHEELER ENVIRONMENTAL
CORPORATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mary Ruth Mann, Esq., Leo McGuigan, Esq., *Law Offices of Mann and Peck, Seattle, Washington*

For the Respondent International Brotherhood of Teamsters, Local 690:

Kenneth J. Pederson, Esq., *Davies, Roberts & Reid, L.L.P., Seattle, Washington*

For the Respondent Foster Wheeler Environmental Corporation:

Steven R. Peltin, Esq., *Preston Gates & Ellis L.L.P., Seattle, Washington*

**ORDER DENYING MOTION FOR AN ENLARGEMENT OF TIME TO FILE A
PETITION FOR REVIEW AND DISMISSING UNTIMELY FILED PETITION
FOR REVIEW**
Background

This case arose when the complainant, Dennis Dumaw, filed a complaint alleging that the International Brotherhood of Teamsters, Local 690 ("Local 690") and Foster Wheeler Environmental Corporation ("Foster Wheeler") conspired to discriminate against him in violation of the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995) and a number of environmental protection statutes. Pursuant to 29 C.F.R. § 24.7 (2001), a Department of Labor Administrative Law Judge, ("ALJ")

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issued a Recommended Decision and Order Dismissing Complaint (R. D. & O.) on June 6, 2002. The ALJ concluded:

Because Dennis Dumaw has failed to establish that Foster Wheeler played any part in his lay-off or discharge, or that Local 690 laid him off or discharged him because he engaged in protected activity, I recommend that his complaint filed with the Occupational Safety and Health Administration on August 30, 2000, be dismissed.

Dumaw v. International Brotherhood of Teamsters, Local 690, ALJ No. 2001-ERA-6, slip op. at 38 (June 6, 2002). The R. D. & O. included this "Notice":

This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.

Id.

Pursuant to 29 C.F.R. § 24.8, Dumaw's petition for review was due no later than June 20, 2002. However, Dumaw failed to file a petition for review by June 20th. Instead, on June 26, 2002, Dumaw filed a request for an extension of time to file a petition for review. Both Local 690 and Foster Wheeler filed responses to Dumaw's motion requesting the Board to deny Dumaw's request for an extension of time to file a petition for review. Dumaw filed a reply to the Respondents' oppositions on July 11, 2002, and on July 18, 2002, Dumaw filed a petition for review with the Board.

Issue Presented

Whether the Board, guided by the principles of equitable tolling, should accept Dumaw's untimely-filed petition for review.

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Discussion

Pursuant to 29 C.F.R. § 24.8(a):

Any party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a petition for review with the Administrative Review Board . . . , which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, such a petition must be received within ten business days of the date of the recommended decision of the administrative law judge, and shall be served on all parties and on the Chief Administrative Law Judge.

Although the ALJ specifically notified Dumaw of the applicable limitations period, he nevertheless failed to file a timely petition for review of the ALJ's Recommended Decision and Order.

The regulation establishing a ten-day limitations period for filing a petition for review with the ARB is an internal procedural rule adopted to expedite the administrative resolution of cases arising under the environmental whistleblower statutes. 29 C.F.R. § 24.1. *Accord Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 3 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999). Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the ARB, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review. *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3; *Duncan v. Sacramento Metropolitan Air Quality Management District*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999). *Accord American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). *Cf. City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109 (4th Cir. 1989)(FERC could not waive compliance with regulation requiring that water quality certification requests be made in compliance with state law because the regulation clearly is designed to confer a benefit upon the states by discouraging prospective licensees from thwarting state administrative procedures.).

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The Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the

limitations period in a particular case. *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4; *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2. In *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. However, the court held that because Congress, not the courts or administrative agency, was entrusted with the responsibility to determine the statutory time limitations, the restrictions on equitable tolling must be "scrupulously observed." *Id.* at 19. The court recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Id. at 20 (citation omitted).

Dumaw initially explained his failure to timely file:

[T]he reasons are that complainant's counsel, during the month of June, has, thus far, responded to ten Motions for Summary Judgement and in addition has been contending with a complex recovery from a broken ankle. An oversight on complainant's Petition for Review date occurred and counsel immediately called the Administrative Review Board upon learning of the fact that the review date passed and immediately filed this request.

Letter from Attorney Mary Ruth Mann dated June 26, 2002.

Dumaw does not argue that Respondents either deceived him in regard to his cause of action or that he timely filed the petition for review in the wrong forum. Although Dumaw's initial filing does not specify the grounds for tolling upon which he relies, he appears to contend that extraordinary circumstances prevented him from timely filing his petition for review. Foster Wheeler argues that neither the busy schedules of Dumaw's counsel nor the fact that one of his attorneys was recovering from a broken ankle constitute extraordinary circumstances sufficient to warrant tolling of the limitations period. Foster Wheeler further avers:

Mr. Dumaw has *two* attorneys working on his case, one of whom has significant experience in employment law. A busy schedule with multiple briefing deadlines is *the norm* for capable employment lawyers. In addition, filing a petition for review takes little time to accomplish. One of

Mr. Dumaw's attorneys could have found 30 minutes time during the 10-day appeal period to prepare a simple petition for review.

Letter to ARB from Foster Wheeler dated July 3, 2002 at 3.

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We agree with Respondents that Dumaw has failed to demonstrate extraordinary circumstances for his failure to timely file a petition for review. As an initial matter, it is difficult to determine from Dumaw's pleadings in this case whether Dumaw's counsel contends that they were simply too busy to file the petition for review or that because they were so busy, they overlooked the due date for the petition for review. Mr. McGuigan asserts, "My [ankle] injury greatly impaired my ability to represent my client because of the necessity to take pain medication and this backed up my work load." Declaration of Leo McGuigan (July 11, 2002). However, all that was required of counsel to protect Dumaw's right to appeal was a one-line letter indicating his intent to appeal the ALJ's Recommended Decision and Order. If Mr. McGuigan's recovery from a broken ankle did not prevent him from responding to ten summary judgment motions, it is difficult to understand how such recovery prevented him from filing the required petition for review.

We also note that Mary Ruth Mann, a senior partner in McGuigan's law firm, filed the original letter requesting an extension of time to file the petition for review, Dumaw's reply to the response to the request for an extension of time to file the petition for review and the petition for review. However, the only explanation Dumaw has offered for Mann's inability to timely file the petition for review was that McGuigan "represented complainant 99% of the time with senior partner Mary Ruth Mann, providing advice and guidance" and that Mann was "in trial preparation during the time at issue in this matter and was preparing summary judgement responses and was not working on or available to work on Mr. Dumaw's case." Declaration of Leo McGuigan (July 11, 2002). However, given the minimal effort required to file a timely petition for review, Mann's busy schedule does not constitute an extraordinary circumstance sufficient to toll the limitations period.

Furthermore, to the extent Dumaw's counsel simply overlooked the due date because of the press of other business, we have recently held that clerical errors in docketing due dates do not constitute "extraordinary circumstances." *Howlett v. Northeast Utilities/Northeast Nuclear Energy Corp.*, ARB No. 99-044, ALJ No. 99-ERA-1 (ARB Mar. 13, 2001). Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney."

Lonk v. Wabash Railroad Company, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

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CONCLUSION

Finding no proper grounds upon which to waive the limitations period for filing a petition for review pursuant to 29 C.F.R. § 24.8, we **DENY** Dumaw's Motion for an Enlargement of Time to file a Petition for Review and **dismiss** the untimely-filed Petition for Review.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge